United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1337

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To be argued by
GINO E. GALLINA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1337

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE J. PERSICO, JR.,

Appellant.

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

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Introduction

On October 31, 1973, the prisoner by his attorney, Gino E. Gallina, submitted papers pursuant to Section 2255 of Title 28 of the United States Code requesting that the judgment previously entered be set aside and the prisoner discharged, or in the alternative, the granting of a new trial. In November of 1973 the Government submitted opposition papers to the prisoner's motion to vacate the judgment or grant a new trial. On December 4, 1973, argument was heard before the Honorable John F. Dooling, Jr., United States District Judge. On January 3, 1974, a memorandum and order was filed by Judge Dooling denying the prisoner's motion and dismissing the petition without the granting of a hearing.

The papers submitted by the Government in opposition to the prisoner's petition essentially alleged that Mr. Cancelli is generally unbelievable, inconsistent and unworthy

of belief, that his interview does not represent a true recantation, that he (Cancelli) was an unimportant witness, and that in any event his interview of August 10, 1973 was tainted by a prior and contradictory statement and the fact that the prisoner's investigators invoked the Fifth Amendment at a special grand jury proceeding. The Government's responsive papers make no reference to Gaspar Vaccaro or John Curatella.

The decision of the District Court (Dooling, *J.*) generally followed the rationale of the Government's opposition affidavit. The District Court found that the interview of Cancelli did not constitute a recantation, that Cancelli was an unimportant witness, and that Cancelli was generally unworthy of belief. As to the prisoner's allegations concerning Gaspar Vaccaro, the Court disposed that portion of the petition by characterizing it as an issue previously raised and previously disposed of. Similarly, the District Court found the Curatella aspect of the petition as unworthy of belief. The petition was dismissed and the motion denied without the benefit of a hearing.

POINT I

The testimony of Joseph Cancelli was a vital factor to the Government's case.

An integral part of both the government's opposition papers in the lower court and the District Court's decision was the allegation that the testimony of Joseph Cancelli given at the trial of Indictment Number 60 Cr. 147 was unimportant and could not have affected the verdict reached. Having reached this conclusion, the District Court reasoned that irrespective of any recantation, relief is not available under Section 2255 of Title 28, United States Code. The facts, however, indicate that Cancelli's testimony was a vital factor to the government's case, not

only by virtue of the content of the testimony, but also by the attendant circumstances and conduct of the trial relating to Cancelli's testimony.

It is always a curious factor to watch the government in a case such as this reverse entirely their initial position. There must certainly be a basic assumption that the calling of a witness by an attorney, be he of the government or the defense, is done so with the anticipation of deriving some benefit for his cause. Such an assumption becomes even stronger when one realizes that the attorney who has called the witness has had his agents and colleagues trapsing across half of the United States to find this "unimportant" witness. That the witness was detained in jail to secure his cooperation, threatened with implication in the crime itself to secure his testimony, and that he was subpoenaed and placed under observation to secure his presence, are small tidbits which might lead a rational man to conclude that the government entertains more than a passive interest in the witness.

An analysis of the context of Cancelli's testimony illustrates why the government relentlessly pursued its interest in Joseph Cancelli. This crucial testimony attributed to Carmine Persico the vital element of knowledge of the hijacking. The minutes reflect that the prosecutor went to great pains to elicit from the witness that the alleged statement from Carmine Persico related to the specific plates involved in the hijacking, and not to any license plate whose use might cause a non-specific conflict with the law. Indeed, defense counsel (Maurice Edelbaum) and the prosecutor debated heavily the exact terminology related by Cancelli (A. 30). Further, while nobody is capable of determining what a trial jury considered to be important and what it disregarded the very essence of the reasoning in *McMann* v. *Richardson*, 397 U.S. 759 (1970) is that you cannot attribute a decision to plead guilty to one facet

of the State's evidence is erroneous. Correspondingly, to eliminate it as an unimportant consideration is equally unavailing. While there may not be an unfailing test characterizing Cancelli's testimony that "it was, at best..., a small tile in a large mosaic, the absence of which would scarcely be missed," appears to be an effort not based on the soundest reasoning. In addition to the latter minimization, the District Court suggested that the testimony lent itself "vulnerable to the attack of irrelevancy and remoteness". Inasmuch as an examination of the trial minutes reveals that such an objection was made by the defense counsel and overruled by the very same judge (Dooling, *J.*), one can only conclude that time must have mellowed the Court's opinion.

POINT II

Cancelli's interview reflects a complete recantation.

The decision of the lower court, in addition to characterizing Cancelli's testimony as an unimportant aspect of the government's case, further denoted the Cancelli interview of August 10, 1973 as not being in the nature of a recantation. The District Court correctly pointed out that Cancelli was at times unable to recall the exact sequence of events and did appear to have been prodded. While it may be conceded that Cancelli did not easily rise to the truth, the overall effect of the interview remains as a potent attack upon both the integrity of the prosecution and the veracity of the trial testimony. There can be no doubt that Cancelli now clearly denies that Persico made any statement with respect to the license plates used in the hijacking. This of course was the crux of his testimony and the reason he was called to the stand by the government. When a witness has previously testified that a defendant made an incriminating statement and now vehemently denies that the defendant made such a statement, the inescapable characterization of

such conduct is recantation. Further, if the witness states that the untruthful testimony was given at the urging of a government prosecutor or his agent, such conduct can only be categorized as governmental misconduct.

It is not extremely difficult to dissect a forty-eight page interview so that individual questions and statements taken out of context may be interpreted in a manner adverse to the overall tenor. The fallaciousness of this procedure was no doubt one of the considerations which have caused the Court to provide a hearing where there are disputed facts of a material nature. *Taylor* v. *United States,* 487 F.2d 307 (1973); *Dalli* v. *United States,* 491 F.2d 758 (1974). Efforts to discount the importance of an interview such as that of Joseph Cancelli by urging that it was merely an effort to be a "nice guy" or the result of insistent and persistent pressure built up by the defendant's relatives' visit are improper where there has been no sworn testimony as to either of these factors. In fact, without the benefit of testimony, such conclusions are grossly unwarranted. Such conclusions, however, were perhaps portended by the curious colloquy of December 3, 1973 (pp. 46-47 of the hearing minutes).

POINT III

The Government's method of procuring testimony and the failure to reveal this method violates the basic principles of fundamental fairness and the appellant's rights to due process.

While appellant's papers in the lower court focused primarily on the recantation of Joseph Curatella, it also contained an affidavit by John Curatella and an affidavit of Arthur L. Mass concerning Gaspar Vaccaro.

A reading of the testimony and recantation of Gaspar Vaccaro indicates that he had brought to the attention of the prosecution on numerous occasions that he had been mis-

taker in his recitation of facts concerning the pertinent hijacking. Yet it is clear that instead of seeking the truth, he was rebuffed by the Government and warned that any variation in his position that would jeopardize the case against Carmine Persico would severely affect his own (Vaccaro's) future. Vaccaro's testimony, as indicated by the affidavit of Arthur L. Mass, was based on his own desire to secure a favorable disposition of the matters pending against himself. The same implied threats and pressures were used to coerce Cancelli into giving testimony which was false and damaging to Persico. The transcript of the Cancelli tape indicates a knowing subordination of perjury by both the prosecutor and his agent. The vindictiveness concerning this prosecution (Persico) continued in the Government's obtaining of the testimony of John Curatella. Here too, Curatella's affidavit demonstrates not only the willingness of the Government to suborn perjury, but a distinct effort to create whatever evidence necessary to convict Carmine Persico.

While it is not unknown that the Government frequently employs its powers to waive prosecution in an effort to obtain pertinent testimony, it is also not unknown that such method often produces false and erroneous testimony by the party seeking to curry Government favor. However, when prosecutorial conduct so overreaches so as to coerce and threaten parties, least they say what the Government wishes to hear, then this practice must be condemned as one totally inconsistent with the principles of fundamental fairness we hold so dear to our polity. It has long been held that the unsolicited testimony of disinterested witnesses is that which is most likely to contain a fair, accurate and truthful recitation of the facts. Here, the Government has succeeded in obtaining a conviction by threats, coercion, intimidation of parties who themselves were fearful of implications in the very crime which was to be prosecuted. In this case, the Government cannot seek refuge in that reference is made to an isolated, unimportant incident whose

details were unknown at the time of the trial. We are faced with a situation whose totality of circumstances literally encompasses all of the prosecutorial misconduct which the drafters of our Constitution sought to avoid. Can it be said that a conviction should stand where the very essence of the Government's evidence stemmed from a continuing and abiding effort to threaten and coerce parties to fabricate whatever necessary for the success of the prosecution? Vaccaro, Cancelli and Curatella were not parties gently prodded to give trutnful testimony, but hirelings duped and threatened until the truth became whatever the Government said it was. Most certainly, a hearing would fully develop the allegations contained in the affidavits and exhibits. It would also clearly show a course of Governmental misconduct which cannot be accepted, condoned or ignored if we are going to continue to operate our system of laws under the auspices of the Fourteenth Amendment.

Prior to the testimony of Gaspar Vaccaro, the Government made known to defense counsels that in return for his favorable testimony, they would intercede into a State proceeding and give an account favorable to Vaccaro. However, nowhere in the record or otherwise did the Government reveal that similar "deals" had been made with Cancelli and Curatella. The pertinent exhibit demonstrates that in return for the testimony that the Government wished to hear, these witnesses would not be implicated in the instant hijacking. As such, the Government clearly waived their prosecution.

The failure to disclose such a bargain clearly violates the rule enunciated in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and forecloses a vital part of cross-examination To preclude from the hearing of the jury this most personal interest which these witnesses possessed in the giving of their testimony deprived the jury of an essential ingredient in weighing the credibility of the witness. When such a substantial right has been violated, it is unimpor-

tant whether this was done deliberately or by ignorance. The overall totality of circumstances in this case would certainly indicate that this was nothing more than part of the continuing effort and purposeful design by the Government to secure a conviction at any cost.

Perhaps the leading case standing for the long-recognized principle that the failure to reveal a promise made to a government witness taints the conviction is *Napue* v. *Illinois,* 79 S. Ct. 1173 (1959). But, if there is to be an effective administration of justice, one cannot limit the inquiry to whether or not there has been a specific promise made. The Court must address itself to the overriding consideration, that being material which could be used by defense counsel in an effort to discredit the credibility of a witness' testimony. It is extremely important for a jury whose function is to determine the truth to know the circumstances under which the various witnesses agreed to testify as they did. Where testimony has been procured by the use of the methods as detailed in this memorandum, it is extremely suspect and would unquestionably be viewed as such by a jury. The enormity of the impact such material would have in the hands of competent defense counsel is obvious not only by its content, but by the conspicuous desire of the Government to maintain its secrecy. Most assuredly, the Government should have revealed the methods it used to obtain such testimony. To maintain silence and leave defense counsel to their own limited and indeed hazardous inquiries is inconsistent with the fundamental principles of fairness and due process.

The Second Circuit clearly recognized this governmental conduct as a vital part of the defense arsenal in *United States* v. *Campbell,* 426 F.2d 547 (C.A. 2, 1970) at p. 549:

> "In attempting to establish the motives or bias of a witness against him, a defendant may not only elicit evidence showing that the government made

explicit promises of leniency in return for cooperation, but may also show conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of his cooperation. Action evidencing the intention of the government to trade leniency for cooperation are, however, irrelevant unless it can be established that the witness knew of these actions. See *Gordon* v. *United States,* 344 U.S. 414, 422, 73 S. Ct. 369."

To attempt to justify or excuse such unconscionable prosecutorial behavior because of the serious nature of the crime is equally unavailing. It has always been thought that an individual, irrespective of his anti-social behavior, is entitled to the fundamental guarantees of our Constitution. Indeed, to extend these guarantees to an individual whose conduct threatens the tranquillity of our Government only strengthens our system of jurisprudence. If we were to deny such a person that which we hold to be self-evident, then we are on the verge of denying these rights to all. Fair treatment of those who would harm our society is an unfailing test of our civilization. As our most distasteful and unsettling recent history has demonstrated, the abuse of power by those holding high office is the greatest threat to our almost 200 year experiment in constitutional government. Such disturbing events recall the words of the United States Supreme Court: ". . . in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." (*Spano* v. *New York,* 360 U.S. 315 (1959), pp. 320, 321). See also *Blackburn* v. *Alabama,* 80 S. Ct. 274 (1960).

POINT IV

The District Court erred in denying the appellant a prompt hearing.

The issues raised by the appellant concern substantial questions of fact and law, and as such, require a prompt hearing (Title 28, U.S.C. § 2255). The leading case standing for the long observed proposition that the Government cannot let false testimony go uncorrected is *Napue* v. *Illinois, supra.* In that case, the Court held, inter alia:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:
>
> > 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.' "

A criminal conviction obtained by the knowing use of false evidence cannot be tolerated by the Fourteenth Amendment. (See *Miller* v. *Pate,* 87 S.Ct. 75 (1967); *Mooney* v. *Holohan,* 55 S.Ct. 340; *Pyle* v. *State of Kansas,* 63 S.Ct. 177; and *Napue* v. *Illinois, supra.*) There must be no deviation from this established principle. The right to vigorously attack any witness' testimony is preserved in cross-examination, and the defense counsel must be given every opportunity to exercise that right. *United States* v. *Hutchins,* 53 F.R.D. 455 (D.C.E.D. Pa. 1971).

The importance of the openness and frankness with which the Government must act has been clearly established in numerous cases. While the Government's oft-cited defense that the factors raised are merely cumulative or impeaching may have some validity when coupled with a lack of materiality, it forms no valid opposition in the instant case. Indeed, in *United States* v. *Kaplan,* 470 F.2d 100 (C.A. 7, 1972), *cert. denied,* 93 S.Ct. 1443 (1973), the Court held that the failure of the Government to disclose the fallaciousness of the Government witness' testimony, concerning whether he had been promised anything in exchange for his cooperation, amounted to constitutional error which was not eliminated by the availability of additional impeachment evidence regarding the witness' prior convictions, and a new trial was required with respect to the count of the indictment which might have been affected by the witness' testimony. The Court added that the Government's argument, that the witness, in receiving less than he had asked for in return for his testimony was in essence receiving nothing, amounted to an exercise in sophistry.

This circuit has similarly answered the question of "mere cumulative impeachment". In *United States* v. *Miller,* 411 F.2d 825 (C.A. 2, 1969), the Government failed to reveal that their main witness had been subjected to hypnosis. The Court held that irrespective of the fact that defense counsel had plenty of material with which to cross-examine

the witness, the Government had a duty to disclose since there was a significant possibility that the undisclosed evidence might have led to an acquittal or a hung jury.

While it has been held that the required showing of prejudice varies with the degree to which the conduct of the trial has violated basic concepts of fair play [*Kyle* v. *United States,* 297 F.2d 507 (C.A. 2, 1961)], the non-disclosure of a known indictment against a Government witness has been held improper and fatal. *United States* v. *Bonnano,* 430 F.2d 1060 (C.A. 2, 1970), *cert. denied,* 400 U.S. 964. In the *Bonnano* case, the Court specifically rejected the Government's contention that their non-disclosure could be justified by the assumption that the defense already knew of the indictment.

The suppression of evidence by commission or omission is inconsistent with a fair trial and due process of law. *United States* v. *Davilla-Nater,* 474 F.2d 270 (1973), and it is not for the courts to speculate whether or not such evidence could have been utilized effectively. *United States* v. *Consolidated Laundries,* 291 F.2d 563 (C.A. 2, 1961) and *Clancey* v. *United States,* 81 S.Ct. 645. See also, *Corpus* v. *Beto,* 469 F.2d 953 (C.A. 5, 1972).

The essential element in fair and open trial is that the defendant not be denied access to material which he may reasonably use to his advantage. When such material is unavailable, even due to accident, due process requires that the Court act to eliminate any unfairness. *United States* v. *Fishel,* 324 F. Supp. 429 (D.C.N.Y. 1971).

The appellant's petition, exhibits and affidavits show the bad faith and vindictiveness of the Government. Indeed, such courses of conduct in and of themselves have been found to be sufficient ground for judicial sanctions. For such activity is no less an affront to the values we characterize as "due process" than judicial vindictiveness.

United States ex rel. Williams v. *McMann,* 436 F.2d 103 (C.A. 2, 1970); citing *North Carolina* v. *Pearce,* 89 S.Ct. 2072 (1969). See also *United States et al., Petitioners* v. *Hodgson, Respondent,* 73-C-24 (D.C.N.D. Okla., April 16, 1973); citing *Donaldson* v. *United States,* 91 S.Ct. 534 (1971).

The Second Circuit Court of Appeals has been called upon on numerous occasions to chastise prosecutorial misconduct in the trial court. Cf. *United States* v. *Santana* (C.A. 2, Decided October 1, 1973); *United States* v. *Drummond,* 481 F.2d 62; *United States* v. *LaSorsa,* 480 F.2d 552; *United States* v. *Fernandez,* 480 F.2d 726; *United States* v. *Miller,* 478 F.2d 1315; and *United States* v. *Pfingst,* 477 F.2d 177.

Improprieties occurring prior to trial must, of course, also be subject to sanction. Most recently, the Second Circuit Court was called upon to respond to conduct similar to our instant case, conduct which seems to increase at an ever-alarming rate. *United States* v. *Fried,* 486 F.2d 201 (1973). The principal item of information which the Government failed to disclose to the defense was the pendancy in the Southern District of New York of an indictment against Joseph Levy, a key Government witness. The indictment was particularly significant for the reason that if it had been disclosed by the Government, the defense would have used it to impeach Levy's credibility and would have urged that he was testifying favorably for the Government and against Fried in the expectation that he would be accorded leniency in the pending case against him. *United States* v. *Bonnano, supra; United States* v. *Campbell, supra.*

Indeed, Levy was later convicted after trial in the Southern District and was accorded leniency on the recommendation of the prosecutor. In addition, the indictment against Levy charged him with the same type of offense as

that leveled against Fried (receiving stolen goods off a pier). A jury might have reasoned that Levy might have been implicating Fried in order to exculpate himself in the present case. The District Court (Bartels, *J.*) found that the prosecutor's non-disclosure of the indictment, though careless, was not deliberate. The Court of Appeals cautiously remarked that: "With some reluctance, we accept this finding which has evidentiary support in the *testimony of the prosecutor himself.*" (emphasis added) The Court added:

> "Surely the average competent prosecutor would quickly recognize the importance and value of this information to the defense, even in the absence of a request for it. Such negligence hardly adds luster to an important government office whose aim *should be* to achieve justice rather than merely to obtain convictions." (emphasis added)

The Court stated that even accepting the view that this was a case of negligent non-disclosure, reversal is required since there was a showing that there was a significant chance that the undisclosed item developed by skillful counsel could have induced a reasonable doubt in the minds of the jurors to avoid a conviction. *United States* v. *Miller, supra.*

The law is clear that only if the files and records conclusively show that the petitioner is entitled to no relief should the motion be denied without a hearing. *United States* v. *Paglia,* 190 F.2d 445 (C.A. 2, 1951). The purpose of such a hearing is to resolve such disputed issues of fact. *Hill* v. *United States,* 236 F. Supp. 155 (D.C. Tenn., 1964), *cert. denied,* 86 S.Ct. 1467. In light of the supported allegations put forth a hearing should be granted. *Harrison* v. *United States,* 7 F.2d 259 (C.A. 2, 1925); *James* v. *United States,* 175 F.2d 769 (C.A. Fla. 1949); *United States* v. *Barillas,* 291 F.2d 743 (C.A. 2, 1961). As the Court stated in *Taylor* v. *United States, supra*:

> "It is not a novel doctrine peculiar to this court that when a federal prisoner raises an issue which would require a new trial if factually sustained, as the judge conceded to be the case here, see *Giglio* v. *United States,* 405 U.S. 150, 154-55 (1972), and presents a sufficient affidavit in its support, an opposing affidavit by the Government is not part of the 'the files and records of the case' which can be taken to 'conclusively show that the prisoner is entitled to no relief,' within 28 U.S.C. § 2255. The principle was established by the Supreme Court as long ago as *Walker* v. *Johnston,* 312 U.S. 275 (1941), and *Waley* v. *Johnston,* 316 U.S. 101 1942). By this time the rule should be well known to Assistant United States Attorneys, who ought not to lead courts into errors, and to federal trial judges, who ought not to make them."

A short time after *Taylor* v. *United States, supra,* the Circuit again reiterated its position in *Dalli* v. *United States,* at p. 760:

> "As a recent pronouncement indicates, this court takes a dim view of any summary rejection of a petition for post-conviction relief when supported by a '*sufficient* affidavit.' See *Taylor* v. *United States,* Dkt. No. 73-1800 (2d Cir. Nov. 14, 1973) (Slip Opin. 305, at 307). But we have, consistently with that pronouncement, recognized that a judge is well within his discretion in denying a petition when the supporting affidavit is insufficient on its face to warrant a hearing. See *Accardi* v. *United States,* 379 F.2d 312 (2d Cir. 1967); *Mirra* v. *United States,* 379 F.2d 782 (2d Cir. 1967). Section 2255 requires a hearing to resolve disputed issues of fact 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'"

CONCLUSION

The recantation of vital testimony taken together with a continuing course of conduct violative of fundamental fairness are grave and serious issues not to be dealt with summarily. Both the statute (Title 28, United States Code, Section 2255) and case law call for a prompt hearing to resolve disputed issues. The District Court's attempt to resolve such pertinent questions without the benefit of testimony at an evidentiary hearing was error. On the facts and the law, the District Court's decision of January 3, 1974 should be reversed and the matter remanded for an immediate hearing.

Respectfully submitted,

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